

informed Gardner that the records did not exist. With respect to work-related training, the Office of Chief Counsel denied the request for the following reasons: 1) the requested records came under the personal security exemption of Section 708(b)(1)(ii) of the Right-to-Know Law (Law),¹ 65 P.S. §67.708(b)(1)(ii); 2) the requested records fell within Section 708(b)(2) of the Law, 65 P.S. §67.708(b)(2) which excludes records maintained by an agency in connection with law enforcement or other public safety activity that, if disclosed, would reasonably be likely to jeopardize or threaten public safety or preparedness or a public protection activity; 3) the requested records fell within Section 708(b)(16) of the Law, 65 P.S. §67.708(b)(16), which exempts from disclosure records of an agency relating to or resulting in a criminal investigation; 4) the requested records fell within Section 708(b)(17) of the Law, 65 P.S. §67.708(b)(17), which exempts from disclosure records relating to a noncriminal investigation; 5) the requested records came under an exemption from disclosure of academic transcripts and examinations, Sections 708(b)(15) and 708(b)(7) of the Law, 65 P.S. §67.708(b)(15) and 65 P.S. §67.708(b)(7); and 6) the requested records came under Section 708(b)(7) of the Law, 65 P.S. §67.708(b)(7), which exempts agency employee records from disclosure.²

¹ Act of February 14, 2008, P.L. 6.

² DOC listed these six reasons for the denial of Gardner's request. However, on appeal to this Court, DOC raises only the personal security and public safety exemptions and argues that the work-related training records are not public records under Governor's Office Management Directive 505.18 and the act known as the Inspection of Employment Records Law (IERL), Act of November 26, 1978, P.L. 1212, *as amended*, 43 P.S. §§1321-1324. Because of this Court's disposition of the appeal based on the personal security exemption, Section 708(b)(1)(ii) of the Law, 65 P.S. §67.708(b)(1)(ii), this Court need not address DOC's remaining issues.

Gardner appealed to the OOR. With respect to the request for the vouchers, DOC presented the agency attestation of nonexistence of record of Michael R. Oppman, Budget Analyst 2 at SCI-Fayette, who declared that the requested records did not exist. With respect to the work-related training records, DOC alleged that Gardner attempted to change his request from a list of work-related training given to Hawk in 2009 and 2010 and now requested the list of seminars and classes a business manager would take as part of his or her in-service training. With respect to the original request for work-related training records, DOC asserted that the work-related training records were exempt from disclosure under the personal security exemption of the Law.

DOC attached the declaration of Brian V. Coleman (Superintendent Coleman), superintendent of SCI-Fayette, who stated:

6. The disclosure of the records sought in this request would in my opinion, create an undue and improper risk to the personal security of Mr. Hawk, as well as threaten public safety and the security of the correctional institution for which I am responsible.

7. My opinion is based upon my knowledge and experience resulting from (a) my position as superintendent of the SCI-Fayette, (b) being a part of the senior management for the Department and (c) my years of experience in other positions within the Department.

.....
10. Because of security issues associated with inmate access to this type of record, inmates are not permitted to access these records.

.....
13. Inmates could exploit such information to create a risk to the personal security of the individual employee that could endanger their [sic] life and physical [well-

being], as well as a risk to public safety and the security of SCI-Fayette.

14. The training of Department employees includes measures regarding the custody and control of inmates.

15. The training of Department employees also includes measures for the protection of employees.

16. The training of Department employees also includes subject matter designed to maintain the security of the institution.

17. Revealing the particulars of this training even so far as the title of or subject matter of the training, poses a danger to staff, other inmates and the general public. Knowledge by an inmate of the particulars or nature of the training could enable an inmate to develop countermeasures or subvert the techniques learned by the employee regarding the custody and control of inmates, the security of the institution and the protection of the employee.

18. Inmates with such knowledge could circumvent the processes that the Department has established to maintain the security of its correctional institutions and the safety and welfare [of] the Department's employees.

.....
20. For all of these reasons, the disclosure of the requested information related to training [is] reasonably likely to result in a substantial and demonstrable risk of physical harm to facility staff and/or other inmates.

Declaration of Superintendent Brian V. Coleman, February 18, 2011, Paragraph Nos. 6-7, 10, 13-18 and 20 at 2-4; R.R. at RR-20-RR-22.

On March 9, 2011, the OOR issued a final determination in which it denied the request for the vouchers because it found they did not exist, did not permit Gardner to change his request, and granted the request insofar as it ordered

DOC to provide the requested list of work-related training attended by Hawk. The OOR reasoned:

The Department [DOC] supplied a Declaration which attested to the likelihood that disclosure of the „list of all training given to Harry Hawk“ would threaten public safety or personal security. The Request does not seek the manuals or materials from the training, nor does it seek details regarding the substance of the training. As the OOR and courts have recognized, affidavits may serve as sufficient evidence under the RTKL, „where the affidavit is more than conclusory [sic]. . . .

Neither the Declaration nor the position statement offered by the Department’s [DOC] attorney provides a sufficient factual basis to find disclosure of a list of training taken by a Department [DOC] employee „reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual“ or „jeopardize or threaten public safety.“ The Declaration provides conclusory statements suggesting a public safety or personal security risk exists, but does not provide factual details such that the OOR could find that revealing the titles of training attending [sic] by Mr. Hawk threatens public safety or an individual’s personal security. As a result, the OOR finds that the Department [DOC] fails to meet its burden of establishing that the exemptions under 65 P.S. §§67.708(b)(1) and (2) apply to the particular record requested. (Citations omitted).

Final Determination, March 9, 2011, at 6-8; R.R. at RR-45-RR-47.³

³ The OOR also determined that exemptions for academic transcripts, criminal and noncriminal investigations did not apply.

DOC contends⁴ that the OOR erred when it determined that DOC's factual support for the personal security exemption was insufficient and conclusory.⁵

DOC asserts that the list of work-related training provided to Hawk came under the personal security exemption of the Law. Section 708(b)(1)(ii) of the Law, 65 P.S. §67.708(b)(1)(ii), provides:

(b) Exceptions.—Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

(1) A record, the disclosure of which:

.....

(ii) would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.

DOC bears the burden of proving by a preponderance of the evidence that disclosure of records “would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.” 65 P.S. §67.708(b)(1)(ii). A preponderance of the evidence standard, the lowest evidentiary standard, is tantamount to a more likely than not inquiry. Jaeger v. Bureau of Workers' Compensation Fee Review Hearing Office (American Casualty of Reading c/o CNA), 24 A.3d 1097 (Pa. Cmwlth. 2011).

⁴ A reviewing court in its appellate jurisdiction independently reviews the OOR's orders and may substitute its own findings of fact for that of the agency. Bowling v. Office of Open Records, 990 A.2d 813, 818 (Pa. Cmwlth. 2010), *petition for allowance of appeal granted in part*, 609 Pa. 265, 15 A.3d 427 (2011). In reviewing a final determination of the OOR, a decision of the reviewing court shall contain findings and conclusions based on the evidence as a whole. Section 1301(a) of the Law, 65 P.S. §67.1301(a).

⁵ This Court has foregone the sequence of DOC's arguments.

Here, DOC presented the declaration of Superintendent Coleman which stated that the disclosure of the records requested would create an undue and improper risk to the personal security of Hawk. Superintendent Coleman based his opinion on his knowledge and experience as the superintendent at SCI-Fayette, his role as a member of senior management for DOC, and his experience at other positions with DOC. Superintendent Coleman explained that if inmates knew the types of training DOC employees received that knowledge could create a risk to the personal security of the employee and endanger his health and physical well-being. Superintendent Coleman also stated that the training of DOC employees included measures for the protection of employees and the custody and control of inmates. If an inmate were aware of even the title of training provided to correctional officers, the inmate could develop countermeasures or subvert the techniques learned by the employee and endanger the security of the employee.

The OOR did not disbelieve Superintendent Coleman but made a legal determination that Superintendent Coleman did not provide sufficient factual details for the OOR to determine that the release of the work-related training programs taken by Hawk was reasonably likely to result in substantial and demonstrable risk of physical harm to his personal security.⁶ This Court disagrees. This Court finds the declaration of Superintendent Coleman more than sufficient. This Court agrees with our Pennsylvania Supreme Court that “[a] prison setting involves unique concerns and security risks.” Commonwealth v. Dugger, 506 Pa.

⁶ Although this Court is permitted to make its own findings of facts, this Court here makes a legal determination that Superintendent Coleman’s declaration was sufficient to establish that the work-related training records were exempt from the law under the personal security exemption.

537, 542, 486 A.2d 382, 384 (1985). This Court finds that the release of the requested information would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of Hawk.

Accordingly, this Court reverses.

BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Department of Corrections,	:	
Petitioner	:	
	:	
v.	:	
	:	
Dale Gardner,	:	No. 631 C.D. 2011
Respondent	:	

ORDER

AND NOW, this 27th day of April, 2012, the order of the Office of Open Records in the above-captioned matter is reversed.

BERNARD L. MCGINLEY, Judge